

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

LYDIA F. SELWOOD)	
On behalf of herself and all others)	
similarly situated,)	
Plaintiffs,)	
)	Civil Action No. 5:04CV00021
v.)	
)	<u>MEMORANDUM OPINION & ORDER</u>
)	
VIRGINIA MENNONITE)	
RETIREMENT COMMUNITY, INC.,)	By: Samuel G. Wilson
)	United States District Judge
Defendant.)	
)	

Plaintiff Lydia Selwood has moved for a period of “class” discovery before filing a motion for class certification. Defendant Virginia Mennonite Retirement Community (VMRC) opposes this motion, claiming that Selwood’s allegations are not sufficient to support class certification with Selwood as the class representative. The court finds that the requested “class” discovery is unwarranted because Selwood has not made even a minimal showing that her individual claim is typical of claims of the putative class she seeks to represent. The court therefore denies her motion

I.

Selwood claims that VMRC retaliated against her because she opposed its purported “pattern or practice” of religious discrimination. VMRC hired Selwood in March 2001 for employment in Dining Services and promoted her within several months to the position of Human Resources Assistant and Corporate Receptionist. In April 2002, while distributing faxes, Selwood came across a letter from the Chairman of the VMRC Board of Directors which she alleges shows an intent to discriminate

on the basis of religion. With the permission of the fax recipient, Selwood made a copy of this fax and in June 2002, at a meeting with her supervisor, raised her concerns regarding the role of religion in VMRC's hiring decisions.

In Fall 2002, Selwood was absent from work on several occasions. She was absent for two weeks because her daughter was ill. She then underwent knee surgery in December 2002, which kept her from returning to work until January 2003. At that time she was reprimanded for her absences and required to sign a form indicating she would work every scheduled day for thirty days. On February 13, 2003, Selwood was absent because her son was ill, and because of her own illness she did not return to work until February 19. VMRC required her to sign a form acknowledging that if she missed more work she would be subject to discipline.

On May 29, 2003, VMRC management called Selwood into a meeting regarding her copying the April 2002 fax. At this meeting, Selwood voiced to management her opposition to its purported discrimination on the basis of religion. VMRC informed Selwood that she was suspended without pay for intercepting and copying mail. Although there remains some dispute as to the timing, the parties agree that VMRC terminated Selwood by July 2003.

Selwood alleges that her termination was part of a "pattern or practice" of discrimination by VMRC, based on its preference for Mennonite employees over non-Mennonites. She claims that the copied fax, a personal letter sent from the Chairman of the Board of Directors to a financial supporter, indicates a policy of discrimination on the basis of religion. In support of her class claims, she cites two instances of alleged discriminatory treatment: the hiring of a Mennonite for a position which had not been advertised internally, and the promotion of a Mennonite employee while a non-Mennonite

employee received a reduction in job responsibilities.

II.

A plaintiff seeking discovery prior to filing a motion for class certification must make a preliminary showing that the plaintiff is an appropriate class representative. It is evident from the pleadings that Selwood's retaliation claim is not typical of the disparate treatment claims of the putative class. Because she has failed to make this threshold showing of maintainability, "class" discovery is unwarranted.

District courts may permit discovery prior to class certification on the issue of maintainability of the case as a class action. Doctor v. Seaboard Coast Line Railroad Co., 540 F.2d 699, 707 (4th Cir. 1976). In evaluating whether discovery is appropriate, the court looks not to the merits of the plaintiff's claim, but rather to "whether he is asserting a claim which, *assuming its merit*, will satisfy the requirements of Rule 23." Id. In order to obtain class certification, Federal Rule of Civil Procedure 23(a) has four prerequisites: (1) the class is so numerous that joinder is impracticable, (2) there are questions of law or fact common to the class, (3) the claims and defenses of the representatives are typical of those in the class, and (4) the representatives will fairly and adequately protect the interests of the class.

Although the Fourth Circuit has indicated its preference that the district court "look beyond the pleadings" and conduct a "rigorous analysis" of the issue of class certification, Gariety v. Grant Thornton, LLP, 368 F.3d 356, 367 (4th Cir. 2004), the court nevertheless is convinced that permitting "class" discovery here without any more showing than Selwood has made is unwarranted. "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties

are fairly encompassed within the named plaintiff's claim.” General Tele. Co. of Southwest v. Falcon, 457 U.S. 147, 160 (1982). The burden is on the plaintiff to demonstrate that discovery measures are likely to produce persuasive information substantiating the class action allegations. Doninger v. Pacific Northwest Bell, 564 F.2d 1304, 1313 (9th Cir. 1977). “Although in some cases a district court should allow discovery to aid in the determination of whether a class action is maintainable, the plaintiff bears the burden of advancing a prima facie showing that the class action requirements of [Rule 23] are satisfied or that discovery is likely to produce substantiation of the class allegations.” Mantolerte v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985). With those precepts in mind, the court finds that Selwood has failed to make a minimal showing that her claim is typical of the class she seeks to represent. Because nothing in the pleadings or Selwood's submissions suggests that her individual claim is typical of the claims of the class members, permitting “class” discovery before Selwood has even filed a motion for class certification is unwarranted.

Selwood raises only a retaliation claim, alleging that VMRC terminated her employment in violation of 42 U.S.C. § 2000e-3(a), as a result of her objection to VMRC's alleged policy of religious discrimination. Selwood does not assert that she has a viable religious discrimination claim or even that she experienced discrimination on the basis of her religion.¹ Yet she proposes to represent a class of employees who have been injured as a result of discrimination on the basis of their religion.² Although

¹The court finds it significant that nowhere in Selwood's complaint does she affirmatively allege that she is not of the Mennonite faith. Membership in a protected class is not an element of a retaliation claim.

²Selwood's class-based claim is based on a theory that VMRC engaged in a “pattern or practice” of disparate treatment of non-Mennonite employees. Disparate impact claims involve “facially

there will be an intersection of evidence with regard to Selwood's retaliation claim and VMRC's alleged policy of religious discrimination, given that she claims VMRC terminated her because of her objection to that policy, that intersection alone is not sufficient to satisfy Rule 23's typicality requirement or, for that matter, its adequacy requirement. Claims of retaliation and claims of disparate treatment are based on different legal theories and, despite some overlap, require substantially different evidence and proof structures.

To meet the requirements of Rule 23, claims of the putative class must be "fairly encompassed by the named plaintiff's claims." Falcon, 457 U.S. at 156. The Supreme Court has imposed strict limits on the right of a plaintiff to maintain a class action, declaring that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216 (1974)). The Fourth Circuit has held that the maintainability of a class action depends on "whether the individual claim of a representative plaintiff is sufficiently 'typical' to permit its use as the prototype for resolution of the common claims of the class." Stasny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 274 (4th Cir. 1980). In employment discrimination claims, "each case must turn, based upon its particular facts, on whether the individual

neutral" employment standards that "in fact fall more harshly on one group than another." Raytheon Co. v. Hernandez, 540 U.S. 44, ____ (2003). By contrast, in disparate treatment cases, "the employer simply treats some people less favorably than others because of their race, color, religion, [or] sex." Id. Selwood's complaint does not allege that a "facially neutral" employment standard, such as an educational or physical requirement applied evenly and automatically to affected employees, resulted in an unfavorable impact on non-Mennonites. Instead she claims that VMRC engaged in a stated policy of preference based on religion.

Title VII claim of the named plaintiff and the claims of the Title VII class he purports to represent raise common questions of law or fact.”³ Lilly v. Harris Teeter Supermarket, 720 F.2d 326, 333 (4th Cir. 1983).

Selwood’s individual claim alleges that VMRC terminated her employment in retaliation for her stated objection to alleged discrimination in hiring, promotions, and terminations. The key issue in a retaliation claim is whether the motive underlying Selwood’s termination was retaliatory, not whether the termination was the result of religious discrimination. See Hill v. Lockheed Martin Logistics Mgmt. Inc., 354 F.3d 277, 298 (4th Cir. 2004) (finding that plaintiff failed to show retaliation where she did not demonstrate that her termination was motivated by her protected activity). Retaliation claims “are generally personal in nature. They do not lend themselves readily to class treatment since they usually involve facts and circumstances unique to the claim of the person against whom retaliation is directed.” Pendleton v. Crown, Cork & Seal Co., 1980 U.S. Dist. LEXIS 9726, *11 (D. Md. 1980). See also, Strong v. Arkansas Blue Cross & Blue Shield, 87 F.R.D. 496, 511 (E.D. Ark. 1980) (“Preoccupation with peculiar retaliatory wrongs may well make such person an inadequate representative of the class.”); Sheehan v. Purolator, Inc., 103 F.R.D. 641, 654 (E.D.N.Y. 1984) (“Claims of retaliatory treatment, which require proof of highly individualized facts, generally do not present suitable issues for

³The Lilly standard should not be confused with the Rule 23 requirement of “commonality,” which is relatively easily met. See Newsome v. Up-to-Date Laundry, Inc., 219 F.R.D. 356, 361 (D. Md. 2004) (“The plaintiffs’ burden with respect to commonality is not onerous when few decision makers at one work location are involved.”); Buchanan v. Consolidated Stores Corp., 217 F.R.D. 178, 187 (D. Md. 2003) (“The commonality requirement is relatively easy to satisfy, and very few cases have been dismissed for failing to meet it.”).

class actions.”). On its face, Selwood’s individual retaliation claim involves unique facts and circumstances and requires individualized proof.⁴ Because Selwood’s individual claim ostensibly raises “significant issues of proof separate from those evidentiary issues implicated by the [class] claim[s],” the court finds she has not made a threshold showing that her claim is typical of the class.⁵ See Lilly, 720 F.2d at 334.

III.

Because Selwood’s retaliation claim requires an individualized inquiry into the facts and circumstances of her termination and does not require her to prove that VMRC in fact discriminated against employees and applicants, the court finds that she has not made a minimal showing that her claim is typical of the class she purports to represent. Accordingly, her motion to engage in “class” discovery before she even files a motion for class certification is denied.

It is so **Ordered**

ENTER: This 31st day of August, 2004.

⁴Selwood’s complaint also notes that, in response to her application for unemployment benefits, VMRC indicated that Selwood had been terminated for insubordination. A defense of insubordination as a motivating factor would necessarily require the particular circumstances of Selwood’s termination to be raised at trial. See Sheehan, 103 F.R.D. at 654.

⁵Selwood’s position as a nonsupervisory employee may also render her an inappropriate representative of a class that includes all non-Mennonite VMRC employees. Where the claim of a low-level employee lacks sufficient “nexus” with the claims of class members, the employee cannot adequately represent the interests of the entire class. Gilchrist v. Bolger, 733 F.2d 1551, 1554 (11th Cir. 1983) (nonsupervisory employee could not adequately represent a class of supervisory employees).

UNITED STATES DISTRICT JUDGE